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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

ELF-MAN, LLC,

Plaintiff,

vs.

RYAN LAMBERSON,

Defendant.

No. 2:13-CV-0395-TOR

DEFENDANT LAMBERSON'S  
RESPONSE TO PLAINTIFF'S  
MOTIONS IN RESPONSE TO  
DEFENDANT'S SECOND  
AMENDED ANSWER,  
AFFIRMATIVE DEFENSES AND  
COUNTERCLAIM

1 Plaintiff brings a Motion to dismiss under Fed. R. Civ. P. 12(b)(6), Fed. R.  
2 Civ. P. 9(b), and Fed. R. Civ. P. 12(f). ECF No. 37. The Motion should be denied.

3 **I. The counterclaims are proper under Fed. R. Civ. P. 12(b)(6).**

4 Mr. Lamberson's counterclaims for a declaration of non-infringement, and for  
5 a declaration of copyright unenforceability and invalidity are properly pled. Mr.  
6 Lamberson is under apprehension of a claim, and is entitled to a declaration (i) that  
7 his behavior is non-infringing, and (ii) that plaintiff's behavior prohibits it from  
8 maintaining any claim against him. These allegations are sufficient to state claims.  
9 See, e.g. *Society v. Hunter*, 655 F.2d 938, 943 (9th Cir. 1981); *Hal Roach Studios v.*  
10 *Richard Feiner*, 896 F.2d 1542, 1554-1557 (9th Cir. 1990).

11 **A. Count 1 states a claim for a declaration of non-infringement.**

12 The counterclaim factual narrative at paragraphs 5-17 articulates the  
13 defendant's behavior at the time of the alleged infringement: Mr. Lamberson's  
14 home had a Comcast internet account, but he did not copy *Elf-Man*, nor had he  
15 heard of it, nor did he assist or encourage others to copy it, nor did he have any  
16 control over anyone who may have copied it, nor did he have any financial  
17 relationship with anyone who may have copied it.

18 Mr. Lamberson is entitled to a ruling now to declare as a matter of law that  
19 his behavior does not infringe any copyrights, without the fear, for example, that he  
20 would have to re-litigate that his innocence also applies to plaintiff's claim of  
21 "indirect copying" should that dismissed claim be revived on appeal. As another  
22

1 example, Mr. Lamberson is entitled to a declaratory order that his behavior is non-  
2 infringing should plaintiff's assignee Vision Films ever decide to sue him.

3 **B. Count 2 states a claim for a declaration of copyright unenforceability.**

4 The counterclaim factual narrative at paragraphs 18-56 articulates the  
5 plaintiff's behavior at the time of the alleged infringement: Plaintiff apparently has a  
6 copyright registration, albeit with disclaimed material ("pre-existing footage, pre-  
7 existing photographs, and pre-existing music"), and plaintiff has assigned its  
8 exclusive rights to Vision Films, but plaintiff has nevertheless filed lawsuits seeking  
9 subpoenas and settlements. This is an unlawful attempt to extend its copyright,  
10 justifying an equitable order that the copyright is unenforceable and that plaintiff  
11 surrender the copyright certificate. *See, e.g. Practice Mgmt. v. Am. Med.*, 121 F.3d  
12 516, 520-21 (9th Cir. 1997) (adopting a definition of copyright misuse as an  
13 improper extension of copyright, rendering the copyright unenforceable). Mr.  
14 Lamberson is entitled to the declaration of unenforceability now without having to  
15 re-litigate that the plaintiff's behavior creates unenforceability should plaintiff  
16 appeal the dismissal on "indirect copying," or should plaintiff decide to pursue its  
17 copyright claim against Mr. Lamberson's child.

18 **C. Mr. Lamberson's counterclaims are plausible.**

19 Mr. Lamberson's counterclaims are plausible under *Twombly/Iqbal*.  
20 Counterclaim One, for a declaration of non-infringement, is plausible: Mr.  
21 Lamberson denies that he copied *Elf-Man*. This is plausible since it is the truth.  
22 Counterclaim Two, for a declaration of copyright unenforceability/invalidity, is

1 plausible since the allegations of the counterclaim explain that plaintiff is enforcing  
2 a copyright to which it has assigned-away its exclusive rights. This is plausible  
3 since it is the truth. Declaration of J. Christopher Lynch (“Lynch Dec.”) at ¶¶ 2-6.  
4 The factual narrative is likewise plausible: plaintiff seeded its own work to  
5 bittorrent as a lure to ensnare innocents, because, according to the plaintiff’s own  
6 documents, the work was being copied before it was publicly released, plus,  
7 plaintiff has not acted in a manner that is consistent with an aggrieved copyright  
8 holder trying to stop infringement. The other allegations are also plausible: the  
9 investigations are flawed, since, for example, the “investigators” were unknown to  
10 plaintiff’s counsel who did not direct the investigation and who remains unwilling  
11 to disclose the relationship of the plaintiff to these German investigators who are  
12 now demanding to be paid in order to be deposed. Lynch Dec. at ¶¶ 7-8.

13 **D. The counterclaims are not barred by the *Noerr-Pennington* doctrine.**

14 Plaintiff argues that it has some right to file a series of baseless claims and  
15 that the victims have no legal recourse other than to deny liability, because the  
16 plaintiff is somehow “immune” from any counterclaims. Plaintiff cites *Noerr-*  
17 *Pennington* to support its supposed right, but plaintiff cites no authority applying  
18 this doctrine to bar claims for declaratory relief under copyright law.

19 *Noerr-Pennington* is complex. At its heart, *Noerr-Pennington* is defense  
20 against antitrust claims, but only under special circumstances, and even if the  
21 plaintiff could properly plead and prove the defendant violated the antitrust laws.  
22 The “immunity” arises as the doctrine prohibits the court from entering such an

1 antitrust judgment, but only if the totality of the behavior shown to be violative of  
2 the antitrust laws was the defendant's "petitioning" of the government, since the  
3 right to petition the government is protected along with freedoms of speech and  
4 religion of the First Amendment. But, just like the freedoms of speech and religion,  
5 the freedom to petition the government is not limitless and its exercise is not  
6 without consequences.

7 *Noerr-Pennington* requires that the accused satisfy tests developed by the  
8 Supreme Court. Here, plaintiff fails to demonstrate *Noerr-Pennington* applicability  
9 because: (i) plaintiff fails to cite authority applying the doctrine to requests for  
10 declaratory relief, (ii) plaintiff fails to address the elements of the doctrine, and (iii)  
11 plaintiff fails to address the elements of the applicable exceptions to the doctrine.

12 *Noerr-Pennington* requires that the Supreme Court tests for applicability be  
13 undertaken with the targeted statute of the "claim" in mind. Ordinarily, the targeted  
14 statute of the claim is the Sherman Antitrust Act (15 U.S.C. §§ 1-7), but *Noerr-*  
15 *Pennington* has also been applied to the Racketeer Influenced and Corrupt  
16 Organizations Act (18 U.S.C. §§ 1961-68). By contrast, plaintiff cites no cases  
17 applying *Noerr-Pennington* to claims under the Declaratory Judgments Act (28  
18 U.S.C. § 2201) for relief regarding copyright non-infringement or unenforceability.  
19 In research to oppose this Motion, defendant has found no such cases.

20 *BE & K Construction v. NLRB*, 536 U.S. 516 (2002) sets the modern three  
21 step analysis for application of the *Noerr-Pennington* doctrine: (1) whether an  
22 adverse ruling on the claim is a substantial burden on plaintiff's petitioning rights;

(2) whether the so-burdened petitioning conduct falls within protection of the Petition Clause; and (3) whether the targeted statutory claim can be narrowly construed to avoid the constitutional issue. A party seeking *Noerr-Pennington* immunity must also address whether its petitioning activity falls within the “sham litigation” exception explained in *Professional Real Estate Investors v. Columbia Pictures*, 508 U.S. 49 (1993) (among other Supreme Court cases addressing the sham exception).

**1. Plaintiff fails to prove the elements of *Noerr-Pennington* applicability.**

Here, Elf-Man LLC does not prove applicability of any of these elements.

First, plaintiff fails to articulate how a declaratory judgment that Mr. Lamberson is not an infringer or that the copyright is unenforceable against him is a burden on plaintiff’s petitioning rights – indeed, plaintiff has assigned its petitioning rights to Vision Films. Lynch Dec. ¶¶ 2-6. Plus, Mr. Lamberson has his own rights to petition for declaratory relief – rights plaintiff seeks to burden with this Motion.

Second, plaintiff fails to articulate how its lawsuit is within the protection of the Petition Clause, when it has assigned-away its exclusive rights. Indeed, plaintiff’s request for subpoenas without any fact witness to support them is not “petitioning activity.” Immunity applies only to what may fairly be described as *petitions*, not to litigation conduct generally. For example, the Ninth Circuit in *Theofel v. Farey-Jones*, 359 F.3d 1066, 1078-79 (9th Cir. 2004) reversed a lower court’s 12(b)(6) dismissal entered in reliance on *Noerr-Pennington*. In *Theofel*,

1 Judge Kozinski vacated the dismissal, ruling expressly that subpoenas were not  
2 petitioning activity:

3 “Subpoenaing private parties in connection with private commercial  
4 litigation bears little resemblance to the sort of governmental  
5 petitioning the [*Noerr-Pennington*] doctrine is designed to protect.  
6 Nevertheless, assuming arguendo the defense [*Noerr-Pennington*] is  
7 available, it fails.” (at 1080.)

8 The court found the subpoenas to be “objectively baseless.” *Id.* The party arguing  
9 immunity urged the court to look only at the merits of the underlying litigation, not  
10 at the subpoena. *Id.* But Judge Kozinski disagreed:

11 “They apparently think a litigant should have immunity for any and  
12 all discovery abuses so long as his lawsuit has some merit. Not  
13 surprisingly, they offer no authority for that implausible proposition.  
14 Assuming *Noerr-Pennington* applies at all, we hold that it is no bar  
15 where the challenged discovery conduct itself is objectively baseless”  
16 (at 1080.)

17 Elf-Man LLC’s subpoena campaign, attached to lawsuits where it has no standing  
18 and no chance of success, is likewise objectively baseless.

19 Third, plaintiff fails to articulate whether the Declaratory Judgments Act can  
20 or cannot be narrowly tailored to avoid an improper burden on plaintiff’s legitimate  
21 petitioning rights while providing Mr. Lamberson the declarations he seeks.

## 22 **2. The sham exception to *Noerr-Pennington* applies.**

Plaintiff fails to explain how the sham exception to *Noerr-Pennington* does  
not apply. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 938 (9th Cir. 2006), cited by  
plaintiff, does not include analysis of the sham exception because it was not raised.



1 Legitimate petitioning activity might be immunized if the *Noerr-Pennington*  
2 tests are met, but sham petitioning activity cannot be immunized even if the *Noerr-*  
3 *Pennington* tests are met. The Ninth Circuit has developed three circumstances  
4 indicative of when certain litigation is “sham” litigation.

5 First, if the alleged unlawful behavior consists a single sham lawsuit, the  
6 antitrust plaintiff must demonstrate that the lawsuit was (1) objectively baseless, and  
7 (2) a concealed attempt to interfere with the plaintiff’s business relationships.

8 Second, if the alleged unlawful behavior is the filing of a series of lawsuits,  
9 the question is not whether any one of them has merit, but whether they are brought  
10 pursuant to a policy of starting legal proceedings without regard to the merits.

11 Third, if the behavior consists of making intentional misrepresentations to the  
12 court, litigation is a sham if “a party’s knowing fraud upon, or its intentional  
13 misrepresentations to, the court deprive the litigation of its legitimacy.” *Freeman v.*  
14 *Lasky, Haas*, 410 F.3d 1180, 1183-1185 (9th Cir. 2005), citing *Kottle v. Northwest*  
15 *Kidney*, 146 F.3d 1056, 1060 (9th Cir. 1998) and *USS-POSCO Industries v. Contra*  
16 *Costa County Bldg. & Construction Council*, 31 F.3d 800, 811 (9th Cir. 1994).

17 *Kearney v. Foley & Lardner*, 590 F.3d 638, 647-48 (9th Cir. 2009)  
18 distinguished *Sosa* and vacated a 12(b)(6) dismissal, finding that the court erred in  
19 holding that the sham exception did not apply against a law firm for its litigation  
20 activities. The court found the plaintiff’s allegations of the sham sufficient by  
21 identifying what representations were made and how they were improper. *Id.*



1 Mr. Lamberson's counterclaims demonstrate applicability of the sham  
2 exception: Elf-Man LLC clearly is more interested in the process of its litigation  
3 than the outcome. Elf-Man LLC assigned away its exclusive rights, but it has  
4 brought nine lawsuits. Each lawsuit includes a Motion for Expedited Discovery, but  
5 without a witness to support its claims. Each complaint alleges each defendant was  
6 "observed infringing," but it is clear this was not the case – at the most, each case  
7 includes only the uploading of one bit of information from an IP address with no  
8 corroborating evidence as to who uploaded the bit or whether the bit is within the  
9 scope of the copyrighted material not otherwise covered by the disclaimers of the  
10 copyright registration. Elf-Man LLC has refused to produce any explanation of the  
11 relationship of its investigators. Elf-Man LLC appears entirely uninterested in  
12 discovering the source of the infringement or in stopping it at its source. Elf-Man  
13 LLC demanded that its fact witness be paid to be deposed. Elf-Man LLC has  
14 obtained no substantive rulings in any of its nine cases. PACER shows that Elf-  
15 Man LLC has a pattern of (i) filing its Doe lawsuits with un-attested allegations that  
16 defendants were "observed infringing," (ii) obtaining Subpoenas to identify IP  
17 address subscribers, and (iii) then doing NOTHING to substantively prosecute the  
18 copyright actions. Indeed, even Vision Films adopted this three-step process in its  
19 Tennessee *Elf-Man* case: filing against Does, obtaining the right to and serving  
20 subpoenas, and then succumbing to administrative dismissal of the case by the court  
21 for failure to prosecute. Lynch Dec. at ¶¶ 4-5, 11-12.

1 Several other Supreme Court cases provide guidance to detect sham litigation.  
2 *Cal. Motor Trans. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972) found that a  
3 pattern of actions brought “with or without probable cause, and regardless of the  
4 merits,” may justify application of the sham exception. *Otter Tail Power Co. v.*  
5 *United States*, 410 U.S. 366, 380 (1973) describes a sham as “evidenced by  
6 repetitive lawsuits carrying the hallmark of insubstantial claims.” *Allied Tube v.*  
7 *Indian Head*, 486 U.S. 492, 500 n.4 (1988) explains a sham as “private action that is  
8 not genuinely aimed at procuring favorable government action,” as opposed to “a  
9 valid effort to influence government action.” *Columbia v. Omni Outdoor*, 499 U.S.  
10 365, 380 (1991) explains that a sham is the use of the governmental process – as  
11 opposed to the outcome of that process – as a weapon.

12 This is precisely what is alleged in the counterclaims: plaintiff is more  
13 interested in the litigation *process* than the litigation *outcome* – the exact distinction  
14 that led the Ninth Circuit to deny application of *Noerr-Pennington* in its most recent  
15 examination of the doctrine. *Rock River Commc’n v. Universal Music Grp.*, \_\_  
16 F.3d \_\_, 2014 WL 223689 (January 22, 2014) (copy attached to Lynch Dec. ¶ 13)  
17 declined to rule on summary judgment that *Noerr* immunity applied, instead finding  
18 a question of fact as to the sham exception. Coincidentally, the genuine issue for  
19 trial was whether defendant UMG had a copyright ownership interest – both the  
20 district court and the Ninth Circuit agreed that UMG might have known that it did  
21 not own exclusive rights when it engaged in its demand letter process. *Id.* This was  
22 evidence that could satisfy the first prong of the sham exception. *Id.* Transmission

1 of cease and desist letters without concurrent litigation was evidence that could  
2 satisfy the second criterion for the sham exception – hoping to “achieve its aim  
3 through the litigation *process* rather than through the *result* of that process.” *Id.*  
4 (emphasis in original). *Rock River* is a traditional *Noerr-Pennington* case because  
5 the statutory claims at issue were the antitrust laws, but the sham exception issues  
6 are similar to those in this case – questions of ownership of the copyright asserted  
7 by the plaintiff.

8 Other cases undertake review of facts as to the sham exception. *Primetime 24*  
9 *Joint Venture v. Nat’l Broad. Co.*, 219 F.3d 92, 101 (2nd Cir. 2000) held *Noerr*  
10 protection inapplicable because the accused had coordinated a series of challenges  
11 “without regard to the merits” of each. *Litton v. AT&T*, 700 F.2d 785, 806-809 (2nd  
12 Cir. 1984) found that AT&T’s continued filing of objectively unreasonable  
13 administrative tariffs supported a sham finding – the court held the filings were  
14 private commercial activity, not requests for governmental action. *Coalition v.*  
15 *VeriSign*, 611 F.3d 495, 506 (9th Cir. 2010) reverses a 12(b)(6) dismissal of  
16 antitrust claims because the district court mis-applied *Noerr* to all of the unlawful  
17 activity, and not just the litigation activity. *Livingston Downs v. Jefferson Downs*,  
18 192 F. Supp.2d 519, 537-39, 541 (MD LA 2001) concluded that the defendants  
19 “filed a series of predatory lawsuits” with “repetitive and groundless claims,” so the  
20 court ruled it would “invoke the *USS-POSCO* variant of the sham-litigation  
21 analysis.” The court found that the “approximately nine law suits at issue” were  
22 sufficient to trigger the sham test. *Id.*

1 Plaintiff has not proven application of the *Noerr Pennington* doctrine, and  
2 even if the court were to so conclude, facts sufficient to constitute the sham  
3 exception have been pled and should be tried. Consequently, the Motion to dismiss  
4 the Counterclaims should be denied (or leave to amend should be granted to allow  
5 Mr. Lamberson to more fully plead facts to support the sham exception).

6 **II. Count 2 is not subject to any Fed. R. Civ. P. 9(b) deficiencies.**

7 Mr. Lamberson's counterclaim count 2 for a declaration that plaintiff's  
8 purported copyright should be rendered unenforceable and invalid is properly pled  
9 under the principles of Fed. R. Civ. P. 9(b). Plaintiff cites no authority for  
10 application of 9(b) to a declaratory relief claim under copyright law. In any event,  
11 the counterclaim factual narrative satisfies the requirements of "identification of the  
12 circumstances constituting fraud so that the [accused] can prepare an adequate  
13 answer from the allegations" and the "time, place, identity, and content" factors of  
14 *Schreiber Distrib. v. Serv-Well Furniture*, 806 F.2d 1393, 1400 (9th Cir. 1986).

15 Paragraphs 1-4 of the narrative are procedural and not subject to Rule 9(b).

16 Paragraphs 5-17 of the narrative explain the events of December 2, 2012 that  
17 Mr. Lamberson did not copy the movie or assist anyone else in doing so.  
18 Paragraphs 5-17 identify dates, places, people, and conduct regarding these points.

19 Paragraphs 18-25 and 28 of the narrative explain that there are two purported  
20 relevant copyrights, and the second copyright (at issue here) includes express  
21 disclaimed portions. Plaintiff cannot prove the imperceptible bit allegedly "copied"  
22 is in fact a bit to which Elf-Man LLC owns copyright. In other words, part of

1 plaintiff's inequitable conduct is claiming copyright infringement of material it does  
2 not own. Paragraphs 18-25 and 28 identify dates, places, people, and conduct  
3 regarding these points.

4 Paragraphs 27 and 29 of the narrative explain that plaintiff has assigned-away  
5 its exclusive rights to Vision Films and/or Anchor Bay and that this is confirmed by  
6 Vision Films' Tennessee lawsuit to enforce copyrights in *Elf-Man*. Paragraphs 27  
7 and 29 identify dates, places, people, and conduct regarding these points.

8 Paragraphs 26 and 30-48 of the narrative explain that the plaintiff's conduct is  
9 not consistent with a party trying legitimately to stop copyright infringement, but is  
10 consistent with a party who either directly or through its contractual agent seeded its  
11 own work into bittorrent for the purpose of harvesting IP addresses to use to pursue  
12 lawsuits without any other corroborating evidence. Paragraphs 26 and 30-48  
13 identify dates, places, people and conduct regarding these points.

14 Paragraphs 49-56 of the narrative explain that plaintiff is using  
15 "investigators" who are not licensed and who are using techniques known to lead to  
16 "false positives" due to many factors for which the investigators admittedly do not  
17 account, and that plaintiff has no other corroborating evidence, but that plaintiff has  
18 pursued its lawsuits nonetheless, potentially exposing itself to sanctions and defense  
19 attorneys fees in every one of the nine courts. Paragraphs 49-56 identify places,  
20 people, and conduct regarding these points and the applicable dates are identified  
21 indirectly by reference to public records and in the preceding 48 paragraphs.

1 Consequently, Mr. Lamberson's factual narrative adequately pleads facts with  
2 specificity to show the scope and breadth of Plaintiff's business scheme.

3 **III. Affirmative defenses are not subject to Fed. R. Civ. P. 9(b) deficiencies.**

4 Mr. Lamberson's affirmative defenses are also proper under Fed. R. Civ. P.  
5 9(b). Plaintiff challenges affirmative defenses 12, 15, 18, 19, 20, and 21. Plaintiff  
6 cites no authority applying Fed. R. Civ. P. 9(b) to any of these traditional  
7 affirmative defenses. In any event, the factual narrative discussed above provides  
8 numerous dates, places, people, and conduct as support to meet any notice-pleading  
9 requirements of these affirmative defenses. Plaintiff's copyright misuse (#12) is  
10 detailed; the actions of plaintiff or its privies (#15) that caused its damages is  
11 detailed; plaintiff's unclean hands (#18) are detailed; facts indicating plaintiff  
12 should be estopped from asserting its copyright (#19) are detailed; facts indicating  
13 plaintiff has waived its copyright (#20) are detailed; and facts indicating the  
14 unenforceability of the copyright (#21) are detailed.

15 Consequently, plaintiff's argument that Fed. R. Civ. P. 9(b) somehow applies  
16 and somehow has not been met should be denied. If, however, the court is inclined  
17 to grant this aspect of the motion, Mr. Lamberson seeks leave to amend to provide  
18 more detail to satisfy any deficiencies the court may find.

19 **IV. The affirmative defenses, exhibits, and prayer for relief are proper.**

20 Pursuant to Fed. R. Civ. P. 12(f), Plaintiff challenges several of Mr.  
21 Lamberson's affirmative defenses, exhibits, and requests from the prayer for relief.  
22 Interestingly, plaintiff cites to *Fogerty v. Fantasy*, 984 F.2d 1524, 1527 (9th Cir.

1 1993) as authority for its Motion – the very case where the Supreme Court  
 2 recognizes that defendants who prevail in copyright cases are entitled to attorneys  
 3 fees (510 U.S. 517 (1994)). Rule 12(f) motions are generally disfavored (*see, e.g.,*  
 4 *Dep’t of Toxic Substances Control v. Alco Pacific*, 217 F. Supp.2d 1028, 1032-33  
 5 (C.D. Cal. 2002); *United States v. 729.773 Acres of Land*, 531 F. Supp. 967, 971 (D.  
 6 Haw. 1982)), and plaintiff’s Motion should be denied.

7 **A. Mr. Lamberson’s affirmative defenses should not be stricken.**

8 Plaintiff challenges affirmative defenses 2, 3, 5, 8, 10, 14, 23, 24, 25, 26, 27,  
 9 and 28. But, all of these allegations are proper – none are “spurious” – and, thus,  
 10 they should remain in the case at Mr. Lamberson’s disposal.

11 Affirmative defenses 2 and 3 regarding necessary parties and standing are  
 12 proper: Plaintiff is unaware which aspect of its movie has been allegedly infringed  
 13 by the IP address associated with Mr. Lamberson – for example, the aspect  
 14 allegedly infringed might be the “disclaimed” “pre-existing” works expressly  
 15 excluded from the copyright, and presumably owned by others who are not named  
 16 in the action. Plaintiff has assigned away its exclusive rights, yet pursues numerous  
 17 copyright claims without right to do so. Affirmative defense 5 is proper: plaintiff is  
 18 not able to show that the allegedly uploaded piece from defendant’s IP address is in  
 19 fact an aspect of the work which is covered by the plaintiff’s purported copyright  
 20 certificate. Affirmative defense 8 is proper: plaintiff is only entitled to a maximum  
 21 statutory damage for any one work from any defendants who are liable jointly and  
 22 severally, as the First Amended Complaint alleges Mr. Lamberson is liable (ECF



1 No. 1 at ¶146). Affirmative defense 10 is proper: despite numerous opportunities,  
2 plaintiff has never made its purported copyright registration certificate of record. 17  
3 U.S.C. § 411 requires registration as a pre-requisite to suit and 17 U.S.C. § 412  
4 requires prompt registration as a pre-requisite to statutory damages. 17 U.S.C. §  
5 411(b)(1) acknowledges that “A certificate of registration satisfies the requirements  
6 of this section [411] and section 412...” but plaintiff has nevertheless failed to  
7 submit the certificate. Additionally, 17 U.S.C. §410(c) provides statutory prima  
8 facie presumptions as to the validity of the copyright and the facts in the certificate,  
9 but, here the certificate has never been presented to the court, and, thus, the  
10 presumptions are not available. Affirmative defense 14 is proper: *Newton v.*  
11 *Diamond*, 388 F.3d 1189, 1192-1193 (9th Cir. 2004) recognizes the *de minimus*  
12 defense – trivial copying is not actionable. Affirmative defense 23 is proper:  
13 although the First Amended Complaint does not articulate any third-party  
14 beneficiary contract claim, plaintiff’s response to a Fed. R. Civ. P. 12(b)(6) motion  
15 claims that Elf-Man LLC is somehow a third-party beneficiary of the ISP  
16 relationship between Mr. Lamberson and Comcast. Plaintiff might appeal the ruling  
17 dismissing its Count 3, and Mr. Lamberson is entitled to defend that Elf-Man LLC  
18 is not entitled to enforce any terms of Mr. Lamberson’s agreement with Comcast.  
19 Affirmative defenses 24 and 25 are proper: plaintiff’s “investigator” was “engaged  
20 in the business of detecting, discovering, or revealing” “evidence to be used before a  
21 court,” thereby triggering applicability of the private investigator statutory  
22 provisions at R.C.W. § 18.165.010 (definition of “private investigator agency”), but

1 these investigators are not licensed under the provisions, they have not sought  
2 temporary assignment rights, nor have they posted the required bond. Affirmative  
3 defenses 26 and 27 are proper: plaintiff claims to have “investigators” that have  
4 “observed infringing” by Mr. Lamberson (ECF No. 1 at ¶83), but in fact these  
5 investigators were not in physical or technical proximity to Mr. Lamberson and,  
6 thus, by definition, could not have “observed” Mr. Lamberson doing anything.  
7 These are avoidances under Fed. R. Civ. P. 8(c)(1) – not only is the “observed  
8 infringing” allegation denied, Mr. Lamberson is entitled to show that it could never  
9 have been true and that any objective plaintiff should have known this. Affirmative  
10 defense 28 is proper because foreign corporations are required to be authorized to  
11 conduct business in Washington state, and plaintiff is engaged in a business  
12 program to trick people into paying it money, premised on sham litigation.

13 **B. Mr. Lamberson’s exhibits should not be stricken.**

14 Plaintiff moves to strike the exhibits attached to the counterclaims but  
15 provides no authority for doing so. Each of the 13 exhibits are items in the public  
16 record directly attributable to plaintiff (Exhibits 1 and 2 from the U.S. Copyright  
17 Office relate to *Elf-Man* copyrights; Exhibit 3 is the Complaint filed by Vision  
18 Films, the assignee of the exclusive rights in *Elf-Man*; Exhibits 4-12 are the typed-  
19 up “charts” allegedly showing infringement in each of the cases plaintiff has  
20 initiated; Exhibit 13 is the typed-up “chart” allegedly showing infringement in the  
21 case filed by Vision Films showing direct date/time overlap with the charts  
22

1 submitted to the courts by Elf-Man LLC. All of these exhibits illustrate the points  
2 made in the counterclaims and provide additional detail for them.

3 **C. Mr. Lamberson's prayer for relief should not be stricken.**

4 Plaintiff moves to strike Mr. Lamberson's prayer requests (d) (for an order to  
5 plaintiff to cancel its own registration), (f) (for money damages), (g) (for an order  
6 prohibiting plaintiff's "investigators" from presenting testimony), (h) (requiring the  
7 posting of a bond), and (i) (for sanctions). Plaintiff cites no authority that prayer  
8 requests are subject to Rule 12(f). Nevertheless, each of the prayer requests is  
9 material and pertinent to Mr. Lamberson's defense and should stand.

10 Prayer request (d) is proper: the court can through its equitable powers order  
11 the plaintiff to surrender its copyright certificate. Prayer request (f) is proper: Mr.  
12 Lamberson has pled facts sufficient to state a claim under the Washington  
13 Consumer Protection Act, R.C.W. § 19.86. (e.g. paragraph 5 of the Counterclaim  
14 narrative). Should the court find that *Noerr-Pennington* does not apply or that the  
15 sham exception applies, Mr. Lamberson reserves his right to assert claims for  
16 money damages and prayer request (f) is lodged to put plaintiff on notice that such  
17 monies will be sought. Prayer request (g) is proper: Mr. Lamberson has pled facts  
18 indicating that plaintiff's "investigators" are un-licensed, are using inadequate  
19 techniques, and are seeking compensation for their testimony. Indeed, plaintiff has  
20 indicated that Mr. Patzer, identified as a fact witness in the Initial Disclosures and as  
21 a witness to one of the "charts" plaintiff claims support its claims, expects to be  
22 compensated by Mr. Lamberson for having his deposition taken. Lynch Dec. ¶¶ 7-8.

1 Prayer request (h) is proper: the court can through its equitable powers order the  
 2 plaintiff to post a bond in order to answer the inevitable defense attorneys fees  
 3 against it under *Fogerty v. Fantasy*, 510 U.S. 517 (1994) – fees which are mounting  
 4 due to plaintiff's motion tactics and failure to produce discovery and comply with  
 5 this Court's discovery Order. Lynch Dec. ¶ 7. Prayer request (i) is also proper: the  
 6 court can sanction plaintiff for failure to conduct a proper investigation and for  
 7 filing objectively meritless claims. The procedural pre-requisites for such a sanction  
 8 have been satisfied. Lynch Dec. ¶ 14.

### 9 **V. Conclusion**

10 Plaintiff's elaborate Motion should be denied in its entirety and plaintiff  
 11 should be ordered to promptly respond to Mr. Lamberson's Second Amended  
 12 Answer, Affirmative Defenses and Counterclaims. Mr. Lamberson respectfully  
 13 requests fees and costs incurred in opposing this Motion.

14 DATED this 11<sup>th</sup> day of April, 2014.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 11<sup>th</sup> day of April, 2014, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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